No. 96-8837

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

DONALD E. CLEVELAND and
ENRIQUE GRAY-SANTANA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Acting Solicitor General

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QUESTION PRESENTED

Whether a firearm that is transported in a vehicle must also be within the defendant's immediate reach in order to be "carried" within the meaning of 18 U.S.C. 924(c).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 106 F.3d 1056. The opinions of the district court (Pet. App. 29a-41a, 42a-55a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 18, 1997. The petition for a writ of certiorari was filed on April 30, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following the entry of guilty pleas in the United States District Court for the District of Massachusetts, petitioners

Cleveland and Gray-Santana were each convicted on one count of attempting to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846, and one count of using or carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c). Petitioners were each sentenced to a total of 180 months' imprisonment, to be followed by five years' supervised release. The court of appeals affirmed. Pet. App. 1a-28a.

1. Petitioners Cleveland and Gray-Santana were charged, along with Juan Rodriguez and Ramon Vasquez, in a five-count indictment with various narcotics and weapons offenses. At petitioners' respective plea hearings, the government presented a summary of its evidence that established the following facts, in which petitioners concurred.

Before October 18, 1994, petitioner Gray-Santana agreed with Rodriguez to purchase between five and eight kilograms of cocaine. Rodriguez arranged to procure the cocaine and transport it to Boston. Petitioners Gray-Santana and Cleveland then formulated a plan to steal some of the cocaine from Rodriguez, rather than purchase it. Pursuant to their plan to steal the cocaine, petitioners obtained weapons. Pet. App. 30a, 43a.

In the meantime, agents of the Drug Enforcement Administration (DEA) were conducting surveillance of a known drug trafficker at an apartment complex in Connecticut. The agents observed four individuals, including Rodriguez and Vasquez, leaving the complex. Rodriguez drove a white Isuzu, and Vasquez and two others drove a

Lexus. The DEA agents followed the four men to Boston, where they observed the driver of the Lexus talking with Gray-Santana, who was sitting in a white Mazda driven by Cleveland. All three vehicles were later observed parked close together on St. Stephens Street in Boston. At that time, Vasquez was sitting in the back of the Mazda, and Gray-Santana was in the Isuzu with Rodriguez. As the vehicles attempted to leave the area, the DEA agents stopped and searched both the Mazda and the Isuzu. Six kilograms of cocaine were found in a hidden compartment of the Isuzu, and three handguns were found in the trunk of the Mazda. Pet. App. 30a-31a, 43a-44a.

2. Petitioners Cleveland and Gray-Santana entered guilty pleas, respectively, on July 17, 1995, and July 21, 1995. Pet. App. 31a, 44a. After this Court decided Bailey v. United States, 116 S. Ct. 501 (1995), each petitioner sought relief from his Section 924(c) conviction. On January 11, 1996, after he had filed a notice of appeal from his final judgment of conviction, petitioner Cleveland filed a Motion for Correction of Sentence or Other Appropriate Relief, pursuant to Fed. R. Crim. P. 35(c) and 28 U.S.C. 2255. Pet. App. 42a. Petitioner Gray-Santana filed a similar motion on December 8, 1995, after he had been sentenced but before a final judgment of conviction was entered. Id. at 29a. Petitioner Gray-Santana also sought to withdraw his plea. Ibid.

The district court held that, in light of Bailey, petitioners' Section 924(c) convictions could not be sustained under the "use" prong of the statute. Pet. App. 32a-33a, 46a-47a. The court found, however, that the dictionary definition of "carry" reached

petitioners' conduct of transporting firearms in a vehicle. Id. at 34a, 49a. The court rejected petitioners' contentions that First Circuit authority required that the weapon be immediately accessible to the defendant in order to sustain a conviction for "carrying" it. Id. at 35a-36a, 50a-51a. Instead, the court found that the evidence in the case was "a prime example of using a vehicle to carry firearms in relation to a drug trafficking crime," and it denied petitioners' motions. Id. at 40a, 54a.

3. The court of appeals affirmed. Pet. App. 1a-28a. At the outset, the court agreed that petitioners' convictions could not be sustained under the "use" prong of Section 924(c) after Bailey, as there was no evidence that the firearms had been actively employed. Pet. App. 19a. The court held, however, that petitioners had "carried" the firearms within the meaning of Section 924(c).

The court of appeals reasoned that a firearm can be "carried" in a vehicle, as well as on a suspect's person. Pet. App. 20a. The court also held, in agreement with several other circuits, that a firearm transported in a vehicle need not be immediately accessible to the defendant in order to be "carried" under Section 924(c). Id. at 21a. After considering the ordinary meaning of "carry," the court found that the term "clearly includes the transport of a firearm by car; the concept of whether or not the carried item is within reach plays no part in the definition." Id at 23a. The court recognized that in some circumstances, "a firearm's immediate accessibility to a defendant might be relevant to determining whether or not he was carrying it 'during and in

relation to' a drug trafficking crime," but concluded that that statutory element was satisfied in this case. Id. at 25a. Finally, the court analyzed the decisions of the Second, Sixth, and Ninth Circuits -- which have held that immediate accessibility is required under the "carry" prong -- and concluded that the reasoning of those courts was "unpersuasive." Id. at 26a.[1/]

ARGUMENT

Petitioners contend (Pet. 6-17) that this Court should grant review to resolve the conflict in the circuits on the question whether a conviction under Section 924(c) for "carrying" a firearm in a vehicle requires proof that the firearm was immediately accessible to the defendant. The court of appeals in this case correctly held that immediate accessibility is not required, and the conflict identified by petitioners does not warrant further review at this time.

1. a. Because Section 924(c) does not define "carry," the term must be interpreted "in accord with its ordinary or natural meaning." Smith v. United States, 508 U.S. 223, 228 (1993) (analyzing "use" prong of Section 924(c)). The court of appeals in this case correctly determined that carrying refers simply to the act of transporting an object, and that its plain meaning does not include the limitation that the carried object be "immediately accessible."

1/ The court also rejected petitioners' challenges to the district court's denial of their suppression motions. Pet. App. 14a-18a. Those issues are not presented for review in this Court.

The primary definition of "carry" supplied by Webster's Third New International Dictionary 343 (1976) (emphasis added) is:

> to move while supporting (as in a vehicle or in one's hands or arms); move an appreciable distance without dragging; sustain as a burden or load and bring along to another place.

Indeed, the word "carry" derives from the French "carier," which means "to transport in a vehicle." See ibid. The dictionary employed by this Court in Bailey v. United States, 116 S. Ct. 501, 506 (1995), and Smith offers an even more expansive definition of "carry":

> To convey, or transport, while supporting, originally in a cart or car, hence in any manner; to bear; to transfer; to transmit, to take.

Webster's New International Dictionary of the English Language 412 (2d ed. 1958). In short, to carry an object means to transport it. Although it is frequently true that a carried object is immediately accessible, the ordinary meaning of the verb does not necessarily require that element.

As the Fifth Circuit has cogently explained in a case involving the carrying of a firearm in a vehicle:

> Those cases * * * that would seem to suggest that for there to be a "carrying" the weapons must be located within such proximity so as to make them immediately available for use are distinguishable. The cases requiring "easy reach" are the result of judicial expansions of the definition of "carrying" in a nonvehicle context. When a vehicle is used, "carrying" takes on a different meaning from carrying on the person because the means of carrying is the vehicle itself.

United States v. Pineda-Ortuno, 952 F.2d 98, 104 (5th Cir.) (citations omitted), cert. denied, 504 U.S. 928 (1992). Several other circuits agree that "when a motor vehicle is used, 'carrying a weapon' takes on a less restrictive meaning than carrying on the

person. The means of carrying is the vehicle, itself, rather than the defendant's hands or pocket." United States v. Cardenas, 864 F.2d 1528, 1535-36 (10th Cir.) (footnote omitted), cert. denied, 491 U.S. 909 (1989); accord United States v. Freisinger, 937 F.2d 383, 387 & n.4 (8th Cir. 1991) (agreeing with Cardenas reasoning and affirming Section 924(c) conviction where firearms found in passenger compartment of car); United States v. Farris, 77 F.3d 391, 395 (11th Cir.) (same), cert. denied, 117 S. Ct. 241 (1996).

Petitioners' reliance (Pet. 19) on the definition of the specific phrase "to carry arms or weapons," is misplaced.[2/] First, Section 924(c) does not use that precise language. Second, that definition would restrict "carrying" to situations in which the firearm is physically worn on the defendant's person or in his clothing. As the court of appeals recognized, no circuit has held that the term "carry" is so limited. See Pet. App. 24a. Instead, every circuit to consider the question has recognized that a firearm may be "carried" in a vehicle. And as the above-cited definitions demonstrate, such a "carrying" takes place whenever a firearm is transported; the element of immediate accessibility plays no part in the ordinary definition of "carry."[3/]

2/ Black's Law Dictionary defines that phrase to mean: "To wear, bear, or carry them upon the person or in the clothing or in a pocket." Black's Law Dictionary 214 (6th ed. 1990).

3/ The location of the firearm in a vehicle and its accessibility to the defendant may be relevant in assessing whether the firearm was carried "in relation to" the drug crime. See Pet. App. 25a; United States v. Miller, 84 F.3d 1244, 1260 (10th Cir.) ("[t]o establish th[e] nexus" required by the "during and in relation to" element of Section 924(c), court may consider (continued...)

b. Contrary to petitioners' assertion (Pet. 21-23), the court of appeals' interpretation of "carrying" does not conflict with the reasoning in Bailey. Bailey concerned only the "use" prong of Section 924(c). To the extent that Bailey addressed the meaning of the term "carry," the Court merely made clear that "carry" had a meaning independent of "use," because Congress intended each prong of Section 924(c) "to have a particular, nonsuperfluous meaning." 116 S. Ct. at 507. Thus, the Court explained, under the "active employment" definition it adopted,

> a firearm can be used without being carried, e.g., when an offender has a gun on display during a transaction, or barters with a firearm without handling it; and a firearm can be carried without being used, e.g., when an offender keeps a gun hidden in his clothing throughout a drug transaction."

Ibid.

The decision below does not contravene that aspect of Bailey. Under the court of appeals' interpretation, "carrying" still encompasses a great many scenarios that are not also "uses." For example, the defendant who (as in this case) places a firearm in the trunk of his vehicle, then drives to another location where he consummates a drug deal in or near his car, has not "actively employed" (i.e., "used") the firearm, but he has carried it. See United States v. Miller, 84 F.3d at 1260 (rejecting requirement of "ready access" for "carrying," and noting that, under that

---

3/ (...continued)
accessibility of firearm to defendant and proximity of firearm to drugs), cert. denied, 117 S. Ct. 443 (1996). But the accessibility of the firearm in the vehicle has nothing to do with whether the firearm is carried from one place to another when the defendant moves the vehicle.

interpretation, "the 'carry' prong applies in a great many situations in which the post-Bailey definition of the 'use' prong would not").

Bailey also held that the term "use" in Section 924(c) "must connote more than mere possession of a firearm by a person who commits a drug offense," because if Congress had meant to punish mere possession, it could have so provided. 116 S. Ct. at 506. Contrary to petitioners' contention (Pet. 23), the decision below does not expand the "carry" prong to reach all acts of possession, because a defendant who carries a firearm in a vehicle has done more than passively possess it, regardless of whether he has immediate access to it. The defendant has, by definition, transported or conveyed the firearm; he has "move[d] [the firearm] an appreciable distance without dragging" it, and has "br[ought] [it] along to another place," in connection with a drug trafficking offense. Webster's Third New International Dictionary 343 (1976).4/

2. In the wake of Bailey, five circuits have agreed that a

4/ Petitioners argue implicitly that the element of immediate accessibility will somehow distinguish "carrying" a firearm from mere possession of the firearm. That reasoning turns Bailey on its head. In Bailey, the Court expressly rejected the claim that the placement of a weapon, or its "proximity and accessibility," standing alone, "amounted to something more than mere possession." 116 S. Ct. at 506. In the same vein, proximity and accessibility cannot be what distinguishes mere storage of a weapon in a vehicle from the carrying of that weapon. Instead, as the court of appeals correctly concluded, a weapon is "carried," within the plain and ordinary meaning of that term, whenever it is transported in a vehicle, regardless of its accessibility to the defendant. The active element of transportation is what distinguishes "carrying" from mere possession.

defendant who transports a firearm in a vehicle has "carried" the firearm, regardless of the weapon's accessibility. Those courts hold that vehicular "carrying" under Section 924(c) requires only two elements: "It is the possession of the firearm coupled with the affirmative act of transporting it during and in relation to a drug trafficking crime that precipitates liability under § 924(c)(1)." United States v. Molina, 102 F.3d 928, 930 (7th Cir. 1996) (citation omitted; emphasis added)[5]; see also United States v. Mitchell, 104 F.3d 649, 653 (4th Cir. 1997) ("the plain meaning of the term 'carry' * * * requires knowing possession and bearing, movement, conveyance, or transportation of the firearm in some manner"); Miller, 84 F.3d at 1259 ("the government is required to prove only that the defendant transported a firearm in a vehicle and that he had actual or constructive possession of the firearm while doing so"); United States v. Rivas, 85 F.3d 193, 195 (5th Cir.) ("the 'carrying' requirement of § 924(c) is met 'if the operator of the vehicle knowingly possesses the firearm in the vehicle during and in relation to a drug trafficking crime'" (quoting Pineda-Ortuno, 952 F.2d at 104)), cert. denied, 117 S. Ct. 593 (1996); Pet. App. 23a ("the concept of whether or not the carried item is within reach plays no part in the definition" of "carrying"). These courts have uniformly reasoned that the plain

5/ Despite the "recent and very clear" holding of Molina (United States v. Cooke, 110 F.3d 1288, 1302 (7th Cir. 1997) (Coffey, J., concurring)), a subsequent panel of the Seventh Circuit has inexplicably asserted that it remains an open question whether immediate accessibility is an element of "carrying." Id. at 1298. The discussion of the issue in Cooke was itself dicta, however. See id. at 1297.

meaning of "carry" does not, in the vehicular context, include the limitation of immediate accessibility and that nothing in Bailey requires such a limitation.[6]

The Second, Sixth, and Ninth Circuits, on the other hand, have held that a weapon must be immediately available to the defendant in order to be carried.[7] It remains to be seen, however, whether those courts will adhere to that view in the face of the growing weight of contrary authority. On June 12, 1997, the Sixth Circuit granted the government's suggestion for rehearing en banc of United States v. Malcuit, 104 F.3d 880 (1997). See App., infra, 1a. And the Ninth Circuit also appears to be giving serious consideration to rehearing the issue presented here. The government has filed a suggestion for rehearing en banc of the

6/ In addition, decisions from several other courts suggest that they may follow suit when the issue of firearm-accessibility in a vehicle is squarely presented. See, e.g., Farris, 77 F.3d at 395 (holding that jury could find weapon in glove compartment "carried" where vehicle used as drug distribution center and defendant "knew the firearm was in the automobile"); Barry, 98 F.3d 373, 377 (8th Cir. 1996) (affirming "carry" conviction where gun found in glove compartment; "Bailey does not require us to abandon" holding that "the common usage of 'carries' include[s] 'carries in a vehicle'"), cert. denied, 117 S. Ct. 1014 (1997); United States v. Freisinger, 937 F.2d at 387-388 & n.4 (finding defendant "carried" firearms found in knotted pillowcase inside plastic bag on floor of vehicle).

7/ Petitioner errs (Pet. 17) in suggesting that the Eighth Circuit and the D.C. Circuit also follow this view. The Eighth Circuit has expressly reserved the question, see United States v. Nelson, 109 F.3d 1323, 1326 (1997), though several of its cases suggest that it may endorse the majority view adopted by the First Circuit in the instant case. See note 6, supra. And in United States v. Moore, 104 F.3d 377, 380 (1997), the D.C. Circuit reversed the defendant's Section 924(c) conviction without any analysis, and upon the government's concession. The Moore opinion does not provide the basis for the government's concession, or for the court's acceptance of it.

Ninth Circuit's decision in United States v. Foster, 96 F.3d 1177 (1996) (withdrawn). The court of appeals has withdrawn its opinion in that case, and recently requested a supplemental brief from the government on the issue of the need for en banc review to reconcile the Ninth Circuit's own precedents.[8/] Although the Second Circuit has recently denied the government's suggestion for rehearing en banc of United States v. Cruz-Rojas, 101 F.3d 283 (1996), that court might be inclined to reconsider its views if the Ninth Circuit were to join the Sixth in granting rehearing. Because there is a reasonable possibility that the courts of appeals will themselves eliminate the conflict of authority, we believe that review by this Court is not warranted at this time.

8/ In United States v. Barber, 594 F.2d 1242 (9th Cir.), cert. denied, 444 U.S. 835 (1979), a pre-Bailey case, the Ninth Circuit squarely rejected the contention that "the word 'carries,' as used in [Section 924(c)], connotes only the concept of bearing the weapon upor one's person or having the gun within his immediate control." Id. at 1244. The Barber court affirmed the conviction of a defendant who was carrying a firearm in the locked glove compartment of his car during a drug offense. Id. at 1243.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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LISA SIMOTAS
Attorney

JUNE 1997

96-8837

SUPREME COURT OF THE UNITED STATES

No.

Donald E. Cleveland
Enrique Gray-Santana
Petitioners

v.

United States of America
Respondent

MOTION TO PROCEED *IN FORMA PAUPERIS*

Petitioners Donald Cleveland and Enrique Gray-Santana respectfully move this Honorable Court to allow them to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915 and Sup. Ct. R. 39. As grounds therefor, petitioners state that they are indigent and leave was granted for them to proceed *in forma pauperis* in the United States District Court for the District of Massachusetts and the United States Court of Appeals for the First Circuit pursuant to 18 U.S.C. § 3006A.

Respectfully Submitted,

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April 1997

No. 96- 96-8837

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

DONALD E. CLEVELAND and ENRIQUE GRAY-SANTANA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

AFFIDAVIT OF SERVICE

I HEREBY CERTIFY that all parties required to be served, have been on this 30th day of April, 1997, in accordance with U.S. Supreme Court Rule 29.5(c), three (3) Copies of the forgoing **PETITION FOR WRIT OF CERTIORARI AND MOTION OF PROCEED *IN FORMA PAUPERIS***, by placing said copies in the U.S. Mail, first class postage prepaid, addressed as listed below,

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JOHN H. CUNHA, JR.
for DONALD E. CLEVELAND
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Sworn and subscribed before me this 30th day of April, 1997.

William R. Pierangeli
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My commission expires April 10, 1999

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No. 96-8837

DONALD E. CLEVELAND, ET AL., Petitioners,

v.

UNITED STATES OF AMERICA, Respondent.

AFFIDAVIT OF SERVICE

I, Linda Chloupek, of lawful age, being duly sworn, upon my oath state that I did, on the 29 day of JANUARY, 1998, send out, postage prepaid, from Omaha, NE, 1 package(s) containing 3 copies of the BRIEF FOR PETITIONERS

in the above entitled case. All parties required to be served have been served. Proper postage was affixed to said envelope(s) and they were plainly addressed to the following:

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Washington, D.C. 20005
(202) 879-3939

Subscribed and sworn to before me this 29 day of JANUARY, 1998
I am duly authorized under the laws of the State of Nebraska
to administer oaths.

Linda Chloupek
Affiant

GENERAL NOTARY-State of Nebraska
PATRICIA C. BILLOTTE
My Comm. Exp. Nov. 24, 2000

Patricia C. Billotte
Notary Public

To be filed for:

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

THOMAS A. MALCUIT,

Defendant-Appellant.

ORDER

BEFORE: MARTIN, Chief Judge; MERRITT, KENNEDY, NELSON, RYAN, BOGGS, NORRIS, SUHRHEINRICH, SILER, BATCHELDER, DAUGHTREY, MOORE and COLE, Circuit Judges.

It now appearing that the requisite number of judges in regular active service have voted for rehearing en banc; it is **ORDERED** that the order of June 9, 1997 is hereby withdrawn; it is further **ORDERED**, as provided in Sixth Circuit Rule 14, that the previous decision and judgment of this court are vacated, the mandate is stayed and the case is restored to the docket as a pending appeal.

It is further **ORDERED** that the appellant file a supplemental brief not later than Friday, August 22, 1997, and the appellee file a supplemental brief not later than Monday, September 22, 1997. The Clerk will schedule this case for argument as directed by the court.

ENTERED BY ORDER OF THE COURT

Leonard Green

Leonard Green, Clerk